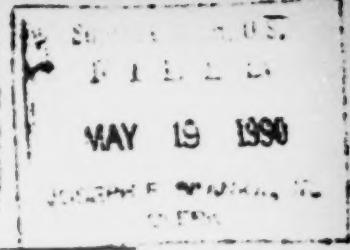


89-2022



NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

MARY A. VOGEL - PETITIONER

VS.

MARK J. ELLIS - RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

MARY A. VOGEL PRO-SE
351 W. FINLEY STREET
P. O. BOX 349
UPPER SANDUSKY, OH 43351-0349
PHONE (419) 294-2170

QUESTIONS PRESENTED

A. Are False Statements, Prejudice, and Corruption allowed in the Court System that take away a Person's Rights, and a Person's Rights to be heard.

B. Should the Court of Appeals of the Third Appellate Judicial District of Ohio, Wyandot County allow out of pocket expenses to be paid when attorney fees were not allowed, when Mary A Vogel was acting on the advice of her attorney in the Time Frame of Co-fiduciary only, in the Estate of Phillip H Gottfried.

C. Are Persons occupying Fiduciary Positions (Positions of trust) allowed to go unpunished for contempt for failing or refusing to perform the trust imposed on them.

D. Are Attorneys allowed to practice

QUESTIONS PRESENTED

D. (continued) Schemes, Cover-ups,
Game Playing, Fraud, False Statements,
Misrepresentations, Concealment, Conspiracy,
Collusion in Estate Settlements, and be
paid for this and allowed to go unpunished.

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A. THIS CASE PROVIDES THIS COURT WITH THE OPPORTUNITY TO PRO- TECT INCOMPETENT, ELDERLY CITIZEN'S OF THE STATES AND OF THE UNITED STATES FROM ABUSE AND EMBEZZLEMENT DURING THEIR ADVANCED YEARS AND TO ASSURE THAT THEIR PROPERTY HOLDINGS WILL BE PROTECTED FROM SWINDLERS.	
B. THIS IS AN ONGOING CASE OF TWO ESTATES WITH EVIDENCE OF FRAUD THAT SHOULD HAVE BEEN SUPPRESSED LONG BEFORE THE EXECUTION OF THE ESTATES BEGAN.	
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FIFTH AND FOURTEENTH AMENDMENT OF 3
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"A person acting as a fiduciary is not permitted to make use of the relationship for his own personal benefit, except with the full knowledge and consent of the other person, and the other person must be mentally competent before the courts will consider him bound by that knowledge or consent. The courts carefully scrutinize any transaction between persons in fiduciary relationships, particularly if the dominant person profits at the expense of the person under his influence. Such a transaction is presumed to be fraudulent and void, and the court will strike it down unless the person who asserts that it is valid can clearly establish its fairness."

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Mary A Vogel respectfully
prays that a Writ of Certiorari to review
judgements and opinions from the Court of
Appeals, Wyandot County, Ohio, Third
Appellate District and the Supreme Court
of Ohio, which involve closely related
questions, with all decisions being denied.

I.

OPINION BELOW

The memorandum opinion of the Court of
Appeals are attached as Appendix A.
Rehearing Entries are attached as Appendix B.

II.

JURISDICTION

The opinions of the Court of Appeals,

Wyandot County, Ohio, Third Appellate
District were filed September 22, 1989,
October 10, 1989, and October 10, 1989.
Rehearing by the Ohio Supreme Court on
February 21, 1990, February 28, 1990 and
April 4, 1990. The jurisdiction of this
Court is invoked pursuant to Article 6,
Sec 2 of the Constitution, 28 U. S. C. §
2254(b)

III.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution Provides:

that no person shall "be deprived of life, liberty, or property, without due process of law." and on the 14th Amendment, which prohibits state governments from encroaching on the individual's rights without due process of law. Due process protects you from having your basic rights violated by government officials at any level federal, state, or local. In order for a government to exercise its power over you, due process requires that you be given (1) notice of the proceedings, (2) an opportunity to prepare for the proceedings, (3) the chance to be heard both in presenting your own claim and in combating the government's claim, and (4) a fair

hearing before an impartial tribunal.

Due process also refers to the government's power to make laws so long as it observes the following criteria: (1) The law in question must have a proper purpose. (2) Constitutional rights cannot be violated. (3) The means used must actually be related to the desired end. (4) A criminal law must be so clear that a person will know what is required of him or her. If the foregoing criteria are not met, the law is unconstitutional. For example, if a law is so vague that persons of common intelligence must guess at its meaning, the law violates due process. The true test of due process is reasonableness: Is the government exercising its power in a reasonable manner to accomplish an objective within the scope of its authority? All persons under authority of United States law are protected by

due process, including Indians, aliens residents of the territories, members of the armed forces, students, and prisoners. The government may treat different classes of people differently as long as there is a rational or compelling reason for this treatment- but arbitrary discrimination violates due process. For example, a provision of the Social Security Act was found unconstitutional because it unfairly denied insurance benefits to fathers whose wives had died. The Supreme Court ruled that the different treatment of surviving fathers and surviving mothers violated the guarantee of due process. On the other hand, a state does not violate due process by charging out-of-state students higher tuition at the state university than residents because out-of-state families are not local taxpaying. The government may restrict individual rights,

but in order not to violate the constitutional guarantee of due process such as traffic laws and laws regulating the sale of liquor, must be for a public purpose and apply to everyone. But a law requiring children to attend only public schools would be unconstitutional because it would interfere with the freedom of parents to supervise the education of their children. The Supreme Court has ruled that municipally owned utilities cannot cut off service without giving the customer due process—that is, an opportunity to challenge the action. (This protection does not apply to customers of private utilities, however.)

IV.

STATEMENT OF FACTS

January 21, 1985, Phillip H Gottfried died. Phillip was a Totally Disabled, Incompetent World War II Veteran and a Brother to Kathlyn A Thiel and Mary A Vogel.

Kathlyn A Thiel was the Guardian of Phillip and had Attorney Richard R Brown file fiduciary papers for her to administer the Phillip H Gottfried Estate.

March 6, 1985, Attorney Richard Brown and Kathlyn Thiel took Phillip's Mother and Beneficiary from Wyandot Manor Nursing Home, took her to Dr. K Y U Park's Office to have her declared incompetent so they could have guardianship over Phillip's Beneficiary also. Dr. K Y U Parks refused unless Kathlyn had the consent of Mary A Vogel.

March 26, 1985, Attorney Richard R Brown and Kathlyn A Thiel went back to Dr. K Y U Parks with the Decedent's Beneficiary

to have a professional signature on a Power of Attorney and a March 26 Fake Will. Dr. Parks refused to do this also because when he read the Fake Will to Decedent's Beneficiary, Beneficiary said she would not sign it, because it did not mention her other children. Beneficiary was suffering from Organic Brain Syndrome and was 91 years old at this time. This Fake Will and Power of Attorney were witnessed on the parking lot of Thiel's Wheels by Attorney Richard R Brown and James S Shull, an employee of Thiel's Wheels.

Mary A Vogel had Bradford W Bailey draw up Fiduciary papers for her to administer the Phillip H Gottfried Estate.

July 5, 1985, Kathlyn A Thiel and Mary A Vogel were appointed Co-fiduciaries.

Attorney Richard R Brown and Kathlyn A Thiel continued to use this Power of Attorney to liquidate assets of the Beneficiary, including a Veterans Beneficiary Insurance Check in the amount of \$10,346.50

which remains unaccounted for, Savings Accounts, Certificates of Deposit, Safety Deposit Box, General Electric Stock, City Loan Savings Account, etc., and left the Beneficiaries Estate with Zero Assets, despite the fact there were other heirs. These two Estates are intertwined.

Judge John G Hunter allowed the guardianship of Phillip to be re-opened from the 39th and final account back to the 33rd account.

Co-fiduciary, Mary A Vogel found the Former Guardian was in possession of Medicare Checks that were intended for the payment of Medical bills at Frederick Smith Clinic back in 1984. Guardian signed and cashed the Medicare Checks, but payment was not received by Frederick Smith Clinic. In fact one Medicare Check in the amount of \$1,232.08 was cashed and pocketed October 7, 1985, by Kathlyn A Thiel, after Kathlyn A Thiel and Mary A Vogel were made Co-fiduciaries of the Phillip Gottfried Estate.

V.

REASONS FOR GRANTING THE WRIT

A. THIS CASE PROVIDES THIS COURT WITH THE OPPORTUNITY TO PROTECT INCOMPETENT, ELDERLY CITIZEN'S OF THE STATES AND OF THE UNITED STATES FROM ABUSE AND EMBEZZLEMENT DURING THEIR ADVANCED YEARS, AND TO ASSURE THAT THEIR PROPERTY HOLDINGS WILL BE PROTECTED FROM SWINDLERS.

B. THIS IS AN ONGOING CASE OF TWO ESTATES WITH EVIDENCE OF FRAUD THAT SHOULD HAVE BEEN SUPPRESSED LONG BEFORE THE EXECUTION OF THE ESTATES BEGAN.

The Third Appellate Court and the Ohio Supreme Court ignored that there is FRAUD involved in the handling of these two estates, and since there is FRAUD involved, my Exceptions to the Inventory should have been heard. (2115.16 ORC, HEARING ON INVENTORY "but such time limit for filing of Exceptions shall not apply in case of fraud or concealment of assets")

signs of both fraud and concealment are prevalent in my Exceptions to the Inventory.

Chief Deputy Clerk, Betty Grossman, intentionally held up the Continuance and Exceptions to the Inventory from being filed until April 4, 1988, the day Judge John G Hunter returned from vacation. Betty Grossman is Prejudice and made False Statements, because she did not have anything to lose, because she was about to retire anyway. Betty Grossman is lying or she would have kept the envelope the Exceptions came in to protect herself. There is Prejudice, False Statements, and Corruption in the Wyandot County, Ohio Court System. Attorneys Mark J Ellis and David F Bacon received their Exceptions to the Inventory and Continuance March 24, 1988 and the Wyandot County Court received theirs too.

My Constitutional Rights to be Heard are being Denied and Violated.

Kathlyn Thiel is in possession of \$3, 378.40 in Medicare Money which still remains unpaid to Phillip's Estate.

March 6, 1986, Attorney Bradford W Bailey and Mary A Vogel started litigation against Co-fiduciary, Kathlyn A Thiel for Medicare Fraud, Misappropriation of Veterans Administration Funds and Social Security Funds.

March 10, 1986, Richard R Brown resigned as attorney for Kathlyn A Thiel.

September 15, 1986, a pre-trial hearing was to be held with all witnesses present. Darlene Woodrum, Representative from Frederick Smith Clinic and a Representative from the Social Security Office in Findlay, Ohio were present with their Documents of Proof.

Cindy Martinez from the Social Security Office in Findlay, stated, "If Judge John G Hunter would not have refused to go on with the September 15, 1986 Hearing, Kathlyn A Thiel would have had to pay back

all the Medicare Money, all the Veterans Administration Benefits Money, and Social Security Money she had misused, would have been fined, and there would have been a prison sentence. Cindy prepared an Investigative Report, "STATEMENT OF CLAIMANT OR OTHER PERSON". which Mary A Vogel signed and dated February 9, 1987.

Mary A Vogel fired attorney Bradford W Bailey for not going on with the September 15, 1986 Hearing, which never did take place, because Judge Hunter refuses to have Kathlyn prosecuted because they are business people in the community.

Kathlyn A Thiel, Guardian and Co-fiduciary of Phillip H Gottfried, started Embezzlement and Misappropriation of funds back in November of 1974, when she took over the guardianship of Phillip, and built up a lucrative business for herself and her family.

Attorney Bradford W Bailey forced Attorney David F Bacon to do an Inventory

which David Bacon has been allowed payment for. Mary A Vogel's attorney fees were not allowed payment.

Attorney David F Bacon drew up a lease on the Beneficiaries Property with the Option to Buy for his Client's Son, Robert J Thiel, to keep Mary A Vogel from taking an inventory of Decedent's Personal Property, (Guardian of Beneficiary, Francis E Vogel, destroyed the March 26, 1985 Fake Power of Attorney, which is now recorded in the recorders office) The Inventory of Mary A Vogel was Unacceptable by the court which showed Phillip H Gottfried was wearing the hand-me-downs of the Thiel Family and showed no personal property. Mary A Vogel's Inventory was never heard because of Corruption and Prejudice in the Wyandot County Court System.

Attorney David F Bacon also defended the Fraudulent, March 26, 1985 Will, witnessed by Kathlyn A Thiel's former attorney, Richard R Brown, drafted on Attorney

Dennis E Pfeifer's Will Form and Will Jacket, (Attorney Dennis E Pfeifer is Corporation Attorney for Kathlyn's place of business, Thiel's Wheels). No attorney will admit they drafted this March 26, 1985 Fake Will. No attorney will admit they took it over to Probate Court to be probated. The Fake Will was probated June 22, 1987. This Will was intended to disinherit Mary A Vogel and the other heirs of Beneficiary, Goldie M Gottfried, and to make his Client, Kathlyn A Thiel Sole Heir. THIS IS WHAT DAVID F BACON WAS HIRED FOR. DAVID F BACON WAS WORKING ON A CONTINGENCY BASIS, IF HE DIDN'T WIN, HE WOULDN'T GET PAID.

Attorney David F Bacon sold my mother's house under my protest and is presently in the possession of its contents and refuses to allow the other heirs access to them, and continues to conceal their where-a-bouts.

Mary A Vogel did extensive investi-

gative work and numerous documents that supports her claims, brought back money into the estate of Phillip H Gottfried which Bacon and Ellis have done nothing but to be an expense to the Phillip H Gottfried Estate to do the bidding of Judge John G Hunter and Kathlyn A Thiel.

Judge John G Hunter, the attorneys, and others are in Collusion, Conspiracy, Fraud, False Statements, Misrepresentation Concealment, and Misappropriation of Funds in the settlement of the Estate of a Totally Disabled, Incompetent, Aged, World War II Veteran, who served in the Asian Conflict and was a severely tortured Japanese Prisoner of War, and the Estate of his Mother and Beneficiary, Goldie M Gottfried, Aged Citizen of the United States and an Aged Citizen of the State of Ohio, whose Estates are being Exploited by Deceit, Greed, and Small Town Politics.

These Estates have been in the Courts for over five years. Judge John G Hunter

refuses to make Kathlyn A Thiel repay any monies back into the Estates she has taken. The Cancelled Medicare Checks from Nationwide Insurance do not lie. The cancelled check from the First Citizen's National Bank for the Veterans Administration Insurance Beneficiary check in the amount of \$10,346.50 does not lie. The documents I have from Frederick Smith Clinic do not lie either. June 21, 1989 Hearing, Judge John G Hunter made a statement in the presence of Patty Vogel and Mary A Vogel, "that he didn't know if he would make Kathlyn repay Medicare Money back into the Estate of Phillip or not." I told my attorney Drew Hanna what went on at the Hearing, he told me, "you are not the first woman that has been discriminated against in the courts and you won't be the last."

Roger Miracle of the Secret Service had advised me to take these matters to the Ohio Supreme Court.

I have asked Attorneys, Bradford W Bailey, Sara L Babich, Randall S Bendure and Drew A Hanna to take a Writ of Prejudice against Judge John G Hunter. They refused. I have taken Writ of Prejudices against Judge John G Hunter and Disciplinary Actions against the attorneys involved. I was told they haven't done anything wrong.

Kathlyn A Thiel and the Thiel Family were very abusive to these two aged, disabled, Incompetent, helpless people, left them alone to rot in poverty, while they used their Federal Funds to live like Kings and Queens. The neighbors that witnessed this through the years do not lie. The relatives that witnessed this through the years do not lie, and I have witnessed this. I bring it to the attention of this Court, because I do not have any other alternative. I know what is being done is not right or fair, with the hope this will be resolved and somehow benefit mankind.

VI.

CONCLUSION

This Case presents an important Constitutional issue regarding the Right to be heard, and the Right to property through Due Process. This Case has established Corruption in the Court System to rip off Estates of Aged, Incompetent, Helpless Citizen's of the United States, which if not clarified, other lower courts might unwisely choose to adopt. These Senior Citizens and their Estates should be protected.

Respectfully submitted,


Mary A. Vogel Pro-Se
351 W. Finley ST
P O Box 349
Upper Sandusky OH 43351
Phone (419) 294-2170

DATED: May 19, 1990



APPENDIX

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COURT OF APPEALS
WYANDOT COUNTY, OHIO
THIRD APPELLATE DISTRICT

IN THE MATTER OF THE ESTATE OF CASE NUMBER
PHILLIP H. GOTTFRIED, DECEASED 16-88-7
(MARY ANN VOGEL, APPELLANT)

O P I N I O N

CHARACTER OF PROCEEDINGS: Civil Appeal from
Court, Probate Division. Common Pleas

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: September 22, 1989.

ATTORNEYS:

MESSRS. HANNA & HANNA
Mr. Drew A. Hanna
Attorney at Law
Hanna Law Building
Bowling Green, Ohio 43402-0025
For Appellant.

MESSRS. MASON, MASON & ELLIS
Mr. Mark J. Ellis
Attorney at Law
110 South Sandusky Avenue
P.O. Box 6
Upper Sandusky, Ohio 43351-0006
For Appellee, Successor Admin.
of the estate of Phillip Gottfried
Deceased

MR. DAVID BACON
Attorney at Law
50 Court Street
P.O. Box 87
Upper Sandusky, Ohio 43351
For Appellee, Kathlyn A Thiel

PER CURIAM. This is an appeal by Mary Ann Vogel from a judgment of the Probate Division, Court of Common Pleas of Wyandot County, entered on April 5, 1988, dismissing her exceptions to the inventory and appraisal filed in the estate of Phillip H. Gottfried, Deceased, "by reason of the fact that they were not timely filed (R.C. 2115.16) and further that no appearance was made."

The appellant assigns error as follows:

"Appellant's exceptions to the inventory in this estate and motion for continuance of hearing on these exceptions were received by U.S. mail on or about March 25, 1988, but were not filed by the Court until April 4, 1988; thus there was a timely filing by the Appellant and the Court's overruling of these exceptions and denying the Appellant's motion for continuance constitutes an abuse of discretion."

R.C.2115.16 prescribes as applicable here:

"Upon the filing of the inventory required by section 2115.02 of the Revised Code, the probate court shall forthwith set a day, not later than one month after the day such inventory was filed, for hearing on the inventory * .

"* * * Exceptions to the Inventory * * * may be filed at any time prior to five days before the date set for the hearing or the date to which such hearing has been continued by any person interested in the estate or in any of the property included in the inventory, * * *."

Case No. 16-88-7

The record discloses that the inventory was filed on March 11, 1988, that the court ordered hearing on same held on April 5, 1988, and that the appellant's exceptions thereto and motion for continuance of hearing thereon were file stamped and filed on April 4, 1988, a date later than "prior to five days before the date set for hearing," as mandated by R.C.2115.16. It should be observed, parenthetically, that the probate court's judgment also notes the failure of appellant or counsel for her to appear at the hearing.

No transcript of proceedings, or authorized substitute therefor, was filed by the appellant and the lower court record does not disclose anything bearing on whether the appellant's exceptions or motion for continuance were mailed to or received for file by the trial court at any time before April 4, 1988. The trial court record is also silent as to whether the issue thus apparently raised in this court for the

Case No. 16-88-7

first time was ever raised in the trial court in any manner, and no motion to set aside the lower court's judgment dismissing the exceptions has ever been filed in the trial court. The exceptions not being timely filed no hearing thereof was required nor could be continued.

Thus, for the reasons that the issue was never raised before the trial court and is not portrayed by the record, the assignment of error is found without merit.

Judgment affirmed.

BRYANT, MILLER and GUERNSEY, JJ., concur.

J. THOMAS GUERNSEY, J., retired, of the Third Appellate District, was assigned to active duty pursuant to Section 6(C), Article IV, Ohio Constitution.

IN THE COURT OF APPEALS OF THE THIRD APPELLATE
JUDICIAL DISTRICT OF OHIO, WYANDOT COUNTY

IN THE MATTER OF THE ESTATE OF :
PHILLIP H. GOTTFRIED, DECEASED : CASE NUMBER
(MARY ANN VOGEL, APPELLANT.) : 16-88-7

J O U R N A L

E N T R Y

This cause came on to be heard on appeal and was submitted to the Court upon the record and the briefs, oral arguments of the parties having been waived.

Upon consideration the Court finds no error prejudicial to the appellant in any of the particulars assigned and argued in appellant's brief.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the Court of Common Pleas of Wyandot County, Probate Division be, and the same hereby rendered, and the same hereby is, remanded to that court for execution.

It is further ORDERED that the Clerk of this Court certify a copy of this judgment to

Case No. 16-88-7

that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge.

Exceptions saved.

J. Thomas Guernsey, J., retired, of the Third Appellate District, was assigned to active duty pursuant to Section 6(C), Article IV, Ohio Constitution.

JUDGES

DATED: Setember 22, 1989.

r

MANDATE FROM THE COURT OF APPEALS

Revised Code, Sec. 2505.36

The State of Ohio,..Wyandot....County. Court of Appeals

At a term of the Court of Appeals, within and for the County of..Wyandot....in the State of Ohio, begun and held before

Hon. ...Thomas.F...Bryant.....

Hon. ...Edgar.L. .Miller..... Presiding Judges

Hon. ...J..Thomas.Guernsey.....

at.....Lima,.....on the 13th day of
...September.....A. D. 1989 among other proceedings then and there had by and before said Court as appears by its Journal were the following, viz:

. IN THE MATTER OF THE ESTATE OF.

. PHILLIP.H. .GOTTFRIED, .DECEASED.

. (MARY.ANN. VOGEL, .APPELLANT)

No. .16-88-7..... VS.

.....
.....

This cause came on to be heard on appeal and was submitted to the Court upon the record and the briefs, oral arguments of the parties having been

waived.

Upon consideration the Court finds no error prejudicial to the appellant in any of the particulars assigned and argued in appellant's brief.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the Court of Common Pleas of Wyandot County, Probate Division be, and the same hereby is, affirmed at the costs of the appellant, for which judgment is hereby rendered, and the same hereby is, remanded to that court for execution.

It is further ORDERED that the Clerk of this Court certify a copy of this judgment to that court as a mandate prescribed by Appellate Rule 27 or by other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge.

Exceptions saved.

Ordered that a special Mandate be sent to the Court of Common Pleas of said County to carry this judgment ..forthwith.....into execution.

Ordered that a copy of this entry be certified to the Clerk of the Court of Common Pleas of said

County, for entry, etc.

I, .Ann.K..Dunbar..., Clerk of the Court of Appeals of Ohio, within and for Wyandot...County, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

Witness my hand and the seal of said Court this .22nd.day.of.September.1989.

.....
Clerk of Court of Appeals

By.....
Deputy

THE STATE OF OHIO Court of Appeals of Ohio,
County of.Wyandot.. Within and for said County
To the Honorable Court of Common Pleas, within and
for said County, GREETING:

We do hereby command you that you proceed
without delay to carry into execution the within
and foregoing judgment of your Court of Appeals in
the cause of

IN THE MATTER OF THE ESTATE OF PHILLIP H. GOTTFRIED
DECEASED, . (MARY ANN VOGEL, .APPELLANT)

vs.

.....
WITNESS..Ann.K..Dunbar.....Clerk of our said
Court of Appeals, at.Upper.Sandusky.., Ohio
this.22nd...day of ..September.....1989..

.....
.....
Clerk

.....
.....
Deputy

COURT OF APPEALS
THIRD APPELLATE DISTRICT
WYANDOT COUNTY, OHIO

DAVID F. BACON,
PLAINTIFF-APPELLEE,

v. CASE NO. 16-88-16

MARK J. ELLIS, SUCCESSOR
ADMINISTRATOR OF THE ESTATE
OF PHILIP GOTTFRIED, DECEASED,

DEFENDANT.

O P I N I O N

(MARY ANN VOGEL, HEIR-AT-LAW OF
PHILIP H. GOTTFRIED, APPELLANT).

CHARACTER OF PROCEEDINGS: Civil appeal from
Common Pleas Court

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: October 10, 1989

ATTORNEYS:

MESSRS. HANNA & HANNA
MR. DREW A. HANNA
Attorney at Law
Hanna Law Building
700 North Main Street
Bowling Green, Ohio 43420-0025

MR. DAVID F. BACON
Attorney At Law
P.O. Box 87
Upper Sandusky, Ohio 43351
For Appellee.

Case No. 16-88-16

PER CURIAM. This is an appeal by Mary Ann Vogel, describing herself as heir at law of Philip H. Gottfried, from a money judgment of the Court of Common Pleas of Wyandot County in favor of plaintiff David F. Bacon on a claim presented to defendant Mark J. Ellis, Successor Administrator of the Estate of Philip Gottfried, Deceased, and rejected by that defendant, on an account for attorney fees for services alleged to have been rendered by the plaintiff as "Co-Attorney to the Estate of Philip Gottfried, Deceased."

The trial court's judgment included the following:

"* * * The Court took testimony regarding the fees submitted by Attorney Bacon and Attorney Bacon made a professional statement as an Attorney At Law and offered documents prepared with reference to said Estate. An opportunity was given to interested party and heir-at-law to cross examine Attorney Bacon with reference to his application for fees.

"In as much as neither Attorney Ellis nor Mary Ann Vogel elected to cross examine, the court finds there is sufficient evidence to grant said fees as requested and the

Case No. 16-88-16

Court accordingly finds the sum of \$1,500.00 reasonable and fair compensation for the services rendered by Attorney Bacon in the Estate of Philip H. Gottfried, Deceased."

Without considering whether Mary Ann Vogel has standing to prosecute this appeal and without striking her appellant's brief because it was captioned and filed in the trial court rather than in this Court we will, in the interests of justice and judicial economy, consider and dispose of her sole assignment of error that the judgment is against the weight of the evidence.

The thrust of her argument is that there is nothing in the estate file, including the documents therefrom offered into evidence in this case by the defendant successor administrator, evidencing that Bacon was co-counsel for the estate rather than merely personal counsel for Kathlyn A Thiel. Similar contentions were made at trial by the defendant successor administrator, who did not testify as a witness but merely made a statement and offered

Case No. 16-88-16

documentary exhibits from the estate file. However, as appears in the court's judgment Bacon made his professional statement describing the services which he rendered and the estate documents which he prepared pursuant to his being retained by Kathlyn A. Thiel, co-administratrix of the estate of Philip H. Gottfried, Deceased, whose capacity in such respect was stipulated to by the defendant successor administrator.

Thus, there was sufficient evidence of probative value to support Bacon's claim and the worst that can be said is that there is also evidence that fails to show Bacon's claimed capacity but which does not show that the services for which he claims compensation were not rendered by him as attorney for Thiel as co-administratrix of the estate.

In these circumstances the trial court's judgment, which was not contested by the successor administrator, cannot be held against the weight of the evidence,

Case No. 16-88-16

the assignment of error is found not well taken, and the judgment for Bacon is affirmed.

Judgment affirmed.

BRYANT, MILLER AND GUERNSEY, JJ., concur.

J. THOMAS GUERNSEY, J., retired, of the Third Appellate District, was assigned to active duty pursuant to Section 6(C), Article IV, Constitution.

IN THE COURT OF APPEALS OF THE THIRD APPELLATE
JUDICIAL DISTRICT OF OHIO, WYANDOT COUNTY, OHIO

DAVID F. BACON,

PLAINTIFF-APPELLEE,

v.

CASE NO. 16-88-16

MARK J. ELLIS, SUCCESSOR
ADMINISTRATOR OF THE ESTATE
OF PHILIP GOTTFRIED, DECEASED,

DEFENDANT,

JOURNAL ENTRY

(MARY ANN VOGEL, HEIR-AT-LAW OF
PHILIP H. GOTTFRIED, APPELLANT).

This cause came on to be heard on appeal and was submitted to the Court upon the record and the briefs, the oral arguments of the parties having been waived.

Upon consideration the Court finds no error prejudicial to appellant in any of the particulars assigned and argued in appellant's brief.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the Court of Common Pleas of Wyandot County be, and the same hereby is, affirmed at the costs of

Case No. 16-88-16 - page 2

the appellant, for which judgment is hereby rendered, and that the cause be, and the same hereby is, remanded to that court for execution.

It is further ORDERED that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge.

Exceptions saved.

JUDGES

Dated: October 10, 1989

J. THOMAS GUERNSEY, J., retired, of the Third Appellate District, was assigned to active duty pursuant to Section 6(C), Article IV, Constitution.

c

COURT OF APPEALS
THIRD APPELLATE DISTRICT
WYANDOT COUNTY, OHIO

IN THE MATTER OF THE ESTATE OF
PHILIP H. GOTTFRIED, DECEASED,
(MARY AN VOGEL, HEIR-AT-LAW OF
PHILIP H. GOTTFRIED, APPELLANT).

CASE NO.
16-88-17

OPINION

CHARACTER OF PROCEEDINGS: Civil appeal from
Common Pleas Court
JUDGMENT: Judgment accordingly.

DATE OF JUDGMENT: October 10, 1989

ATTORNEYS:

MESSRS. HANNA & HANNA
MR. DREW A. HANNA
Attorney At Law
Hanna Law Building
700 North Main Street
Bowling Green, Ohio 43420-0025
For Appellant.

MESSRS. MASON, MASON & ELLIS
MR. MARK J. ELLIS
Attorney At Law
110 South Sandusky Avenue
P.O. Box 6
Upper Sandusky, Ohio 43351
For Appellee.

Case No. 16-88-17

PER CURIAM. This is an appeal by Mary Ann Vogel, "Heir-at-law of Philip H. Gottfried," from a judgment of the Court of Common Pleas of Wyandot County granting her "application for allowance of fiduciary's reimbursement and compensation," for bond expenditures in the sum of \$487.50, but denying such application otherwise.

Her application filed in the lower court alleged her appointment together with her sister Kathlyn A. Thiel on July 5 1985, each as Co-administratrix of the Estate of Philip H. Gottfried, Deceased, and her service as such until removed on July 15, 1987, the two being succeeded by appointment on or about November 6, 1987, of Mark J. Ellis as successor administrator; that on December 3, 1987, she submitted to him a comprehensive statement of services rendered and expenses incurred by her in her former fiduciary capacity; and that her claim was rejected by him by letter dated December 17, 1987. In an exhibit

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attached to her application she summarizes the other out of pocket expenses she alleged she incurred and seeks to recover as follows:

Bailey Law Offices -	Accounts paid in full	\$3,785.03
" " "	Accounts not paid (accrued int. \$122.02)	677.89
Attorney Sara Logsdon Babich	Accounts paid in full	1,185.03
Telephone calls		391.85
Phillip H. Gottfried's medical records		48.75
" " death certificates		14.00
" " income tax returns		34.00
Certifieds and Express Mail		8.60
Business trips		660.00
Probate court copies		75.00
First Citizens National Bank copies		136.00

In denying these expenses the lower court found "that applicant has failed to prove to the satisfaction of the Court that the balance of the claim of Mary Ann Vogel was reasonable and necessary and was incurred to the benefit of the Estate of Philip H. Gottfried, deceased" and "(s)ince applicant has failed in her burden of proof, the balance of applicant's claim should be denied."

Appellant assigns as error that the judgment entry "of the trial court denying reimbursement to Appellant of her out-of-pocket expenses, as Co-fiduciary, of \$7,404.12 is

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against the weight of the evidence."

We note initially that the net denial was \$6,916.62 in that the \$487.50 expenses allowed by the court were included in the total claim of \$7,404.12.

Appellant argues, in substance, that by her testimony and her exhibits received in evidence she has proved that she incurred as co-administratrix and personally paid the expenses for which she seeks reimbursement.

Examination of the bills, receipts and cancelled checks, included as exhibits disclosed that they substantially support the major expenditures both as to amount and as to whom paid. They do not, however show that they were incurred by appellant as Co-administratrix of the estate or for the benefit of the estate, rather than for some other purpose. Statements from attorneys, for example, generally lack itemization or other description and are addressed to appellant personally rather than

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in any fiduciary capacity.

Nevertheless, as to all expense items other than attorney fees, she testified that they were all made "for the Phillip H. Gottfried Estate," and there is nothing in the record to show to the contrary or that they did not benefit the estate.

As to the statements for attorney fees, she testified on direct examination that they "are fees paid out to Bradford Bailey, while I was co-fiduciary of the Phillip H. Gottfried Estate," and "are lawyer fees that are paid out to Sara Babich while I was co-fiduciary of the Philip H. Gottfried Estate." (Emphasis added.) Thus, though she testifies that they were paid out while she was co-fiduciary, neither the statements received by her, the checks issued by her in payment of same, or her testimony show that the services rendered by the attorneys were for the benefit of the estate. Cross-examination of appellant disclosed that in the time frame in-

lved in the statements for attorney fees, both attorneys were admittedly advising her as to one or more other matters, including the guardianship of the decedent, her appeal of the appointment of the successor administrator, an action brought by her against the guardian of the decedent, and a will contest action. Moreover, to the extent that the billings of the attorneys were actually for services rendered appellant as co-administrator and beneficial to the estate, she offered no evidence that the services rendered were of the reasonable value of the amount billed for which she makes claim. See, for example, In re Estate of Verbeck (1962), 173 Ohio St. 557, and Watters v. Kive (1965), 1 Ohio App. 2d 571.

Appellant's problem as to all of the out of pocket expenses which she seeks to recover is compounded by the fact that, probably without advice, she paid the expenses which she thought she was incur-

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ing for the estate from her personal funds rather than estate funds, and without accounting therefor to probate court in the more than two years that she held the appointment as fiduciary.

In our opinion since she was benefited by, and does not protest, that part of the trial court's judgment dealing with the recovery of \$487.50 for bond expenditures, the same should be affirmed. Similarly, since on the evidence reasonable minds could arrive at different conclusions as to whether the attorney fees which she paid and for which she makes claim were incurred for the benefit of the estate and since there is no evidence that the amounts thereof were reasonable in relation to the service rendered, we find the judgment of the trial court not against the weight of the evidence as to them, and, in that respect, the judgment must likewise be affirmed. However, we have found no evidence that the out of pocket expenses for

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telephone calls, medical records, death certificates, income tax returns, certified and express mail, business trips, and for copies, for which she makes claim, were not incurred by her as co-administrator for the benefit of the estate, as she has testified, and we find the trial court's judgment rejecting the part of the claim relating thereto against the weight of the evidence, reverse same in that respect and render final judgment for the appellant as to those amounts.

Judgment accordingly.

BRYANT, MILLER and GUERNSEY, JJ., concur.

J. THOMAS GUERNSEY, J., retired, of the Third Appellate District, was assigned to active duty pursuant to Section 6(C), Article IV, Constitution.

c

IN THE COURT OF APPEALS OF THE THIRD APPELLATE
JUDICIAL DISTRICT OF OHIO, WYANDOT COUNTY, OHIO

IN THE MATTER OF THE ESTATE OF :

PHILIP H. GOTTFRIED, DECEASED, : CASE NO.
16-88-17
(MARY ANN VOGEL, HEIR-AT-LAW OF :
PHILIP H. GOTTFRIED, APPELLANT.): JOURNAL ENTRY

This cause came on to be heard on appeal
and was submitted to the Court on the rec-
ord and the briefs, the parties having wai-
ved oral argument.

Upon consideration the Court find no er-
ror of the Court of Common Pleas of Wyandot
County prejudicial to the appellant as to
that part of its judgment in favor of her
or as to that part of the judgment reject-
ing her claim for out of pocket expenses
in payment of bills rendered to her for
attorney fees. The court find error, how-
ever, prejudicial to the appellant in that
part of the trial court's judgment relat-
ing to other out of pocket expenses con-
stituting part of her claim is against the

weight of the evidence in that there is no evidence to show contrary to her testimony that such other expenses were not incurred by her as fiduciary for the estate of Philip H. Gottfried or that they were not for the benefit of that estate.

Accordingly, it is ORDERED, ADJUDGED and DECREED that so much of the trial court's judgment as relates to the allowance of that part of her claim in the amount of \$487.50 incurred as bond expenditures and as relates to the denial of that part of her claim for \$5,647.92 incurred as attorney fees be, and the same hereby is, affirmed, and that so much of the trial court's judgment as relates to the denial of her claim for out of pocket expenses for telephone calls, medical records, death certificates, income tax returns, certified and express mail, business trips, and for copies, in the total amount of \$1,368.70 be, and the same hereby is, reversed, all at costs in this court to be shared equally by

the appellant and the estate of Philip H. Gottfried, Deceased.

It is further ORDERED, ADJUDGED and DECREED, this court rendering the judgment that the trial court should have rendered as to these latter expenses in the amount of \$1,368.70, that final judgment in that be rendered against the said estate to be paid therefrom by Mark J. Ellis, as successor administrator thereof, together with the sum of \$487.50 previously allowed by the trial court.

It is further ORDERED that the cause be, and the same hereby is, remanded to the lower court for execution of that part of its judgment hereby affirmed, for execution of the judgment for costs in this Court hertofore rendered, and for execution of the final judgment of the trial court rendered by this court.

It is further ORDERED that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescrib-

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ed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge.

Exceptions saved.

JUDGES

J. Thomas Guernsey, J., retired, of the Third Appellate District, was assigned to active duty pursuant to Section 6(C), Article IV. Constitution.

Dated: October 10, 1989

c

The Supreme Court of Ohio

1990 TERM

To wit: January 17, 1990

Mary A. Vogel et al.,:
Appellants, CASE No. 89-1977

v. : E N T R Y

Mark J. Ellis et al.,:
Appellees. :

Upon consideration of the motion for an order directing the Court of Appeals for Wyandot County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, \$40.00, paid by Mary A. Vogel.

(Court of Appeals No. 16887)

THOMAS J. MOYER
Chief Justice

The Supreme Court of Ohio

1990 TERM

To wit: February 21, 1990

Mary A. Vogel et al.,:Case No. 89-1977
Appellants : :

v. : REHEARING ENTRY

Mark J. Ellis et al.,:(Wyandot County)
Appellees. : :

IT IS ORDERED by the Court that re-hearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 16887)

THOMAS J. MOYER
Chief Justice

The Supreme Court of Ohio

1990 TERM

To wit: January 31, 1990

In the Matter of :
the Estate of : Case No. 89-2095
Philip H. Gottfried :
Deceased, et al. :
: E N T R Y

Upon consideration of the motion for an order directing the Court of Appeals for Wyandot County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, \$40.00, paid by Mary Ann Vogel.

(Court of Appeals No. 168817)

THOMAS J. MOYER
Chief Justice

The Supreme Court of Ohio

1990 TERM

To wit: February 28, 1990

In the Matter of : Case No. 892095
the Estate of :
Philip H. Gottfried: REHEARING ENTRY
Deceased, et al. :
: (Wyandot County)

IT IS ORDERED by the Court that re-hearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 168817)

THOMAS J. MOYER
Chief Justice

The Supreme Court of Ohio

1990 TERM

To wit: February 28, 1990

David F. Bacon; :
Mary A. Vogel, :
Appellant, : Case No. 89-2094

v. : E N T R Y

Mark J. Ellis, :
Successor :
Admr., et al., :
Appellees. :

Upon consideration of the motion for an order directing the Court of Appeals for Wyandot County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, \$40.00, paid by Mary Ann Vogel.

(Court of Appeals No. 168816)

THOMAS J. MOYER
Chief Justice

The Supreme Court of Ohio

1990 TERM

To wit: April 4, 1990

David F. Bacon;	:	Case No. 89-2094
Mary A. Vogel,	:	
Appellant,	:	
 v.	:	REHEARING ENTRY
Mark J. Ellis,	:	
Successor	:	(Wyandot County)
Admr., et al.,	:	
Appellees.	:	

IT IS ORDERED by the Court that re-hearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 168816)

THOMAS J. MOYER
Chief Justice

